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In the Supreme Court of the United States

OCTOBER TERM, 1984

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Exemption (j)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(j)(2), is a withholding statute within the scope of Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 53-69) is reported at 721 F.2d 215. The opinion of the district court (J.A. 47-52) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on November 16, 1983. The petition for a writ of certiorari was filed on December 8, 1983, and was granted on April 2, 1984 (J.A. 70). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a, are set forth in full in an appendix to our brief in *United States Department of Justice* v. *Provenzano*, No. 83-1045, at 1a-32a.

STATEMENT

1. Petitioners Gregory Wentz and Alfred Shapiro were each convicted, in unrelated cases, of violating the federal controlled substances laws.[1] At the time of the events described below, both men were incarcerated in the Federal Correctional Institute at Oxford, Wisconsin.

a. In May 1981, petitioner Wentz sent a request to the Drug Enforcement Administration (DEA), seeking a copy of his "entire DEA file" pursuant to the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a.[2] Thereafter, in July 1981, Wentz made a further request for DEA records containing information used in preparing his pre-sentence report. (J.A. 19).

The DEA informed Wentz, in September 1981, that due to a large backlog of records requests, his request could not be processed immediately but would be

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[1] Petitioner Wentz was convicted of possession with intent to distribute hashish, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846. See *United States* v. *Wentz*, 686 F.2d 653 (8th Cir. 1982). Petitioner Shapiro pleaded guilty to distribution of cocaine, in violation of 21 U.S.C. 841(a)(1).

[2] The pertinent provisions of the FOIA and the Privacy Act are described in our brief in *Provenzano* (at 2-6).

processed in chronological order after the large number of previously received requests (J.A. 23). In March 1982, before the DEA had acted on his request, Wentz filed suit in the United States District Court for the Western District of Wisconsin, seeking release of his records.

In April 1982, the DEA denied Wentz's request for his records on the ground that they were contained in a system of records that had been exempted by regulation from disclosure under Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), and were therefore also subject to withholding pursuant to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3) (J.A. 27-28).

b. In October 1981, petitioner Shapiro filed a request with the DEA for a copy of "all records or documents which pertain to any investigation of me or my activities" (J.A. 40). Because of the backlog of records requests, the DEA advised Shapiro that his request would be processed in chronological order in relation to the numerous other records requests that the agency had received. In April 1982, before the DEA had acted on his request (J.A. 44), Shapiro also filed suit in the United States District Court for the Western District of Wisconsin, demanding release of his records (J.A. 7-9). In June 1982, the DEA informed Shapiro that the records he sought were contained in a system of records that had been exempted by regulation from disclosure and that therefore he could not gain access to his records under either the Privacy Act or the FOIA (J.A. 46).

2. In the district court, the DEA moved for summary judgment in both actions, based on affidavits from Russ Arslan, Chief of the DEA's Freedom of Information Division. Arslan's affidavits stated that

the requested records were contained in a system of records that had been exempted from disclosure pursuant to a regulation (28 C.F.R. 16.98) promulgated under Exemption (j)(2) of the Privacy Act (J.A. 12-13, 38-39). Accordingly, the DEA contended that the records sought by petitioners were subject to withholding under both the Privacy Act and Exemption 3 of the FOIA (J.A. 13, 34).

The district court consolidated the two cases and granted the DEA's motions for summary judgment (J.A. 47-52). The court first examined the language of Privacy Act Exemption (j)(2) and FOIA Exemption 3, and concluded that Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3 (J.A. 49-50). The court further concluded that, if the requested records were part of a system of records that had been exempted from disclosure under the Privacy Act, they would also be subject to withholding under the FOIA (J.A. 50).

The district court found that the Arslan affidavits established that the requested records are contained in a system of criminal law enforcement records within the scope of Exemption (j)(2) and that the DEA by regulation had properly exempted this records system from the first party access provision of the Privacy Act, 5 U.S.C. 552a(d)(1) (J.A. 50-51). Accordingly, the court held that the DEA was entitled to withhold the records from petitioners (J.A. 51).

3. The court of appeals affirmed the judgments in both cases (J.A. 53-69). It agreed with the district court that all of the records sought by petitioners are contained within a system of records that had been properly exempted from the first party access requirements of Section (d) of the Privacy Act by

regulations promulgated pursuant to Privacy Act Exemption (j)(2) (J.A. 55-58).[3] (Petitioners do not challenge that determination here.)

The court of appeals then ruled that Privacy Act Exemption (j)(2) is a withholding statute within the scope of FOIA Exemption 3 and that, therefore, documents exempt from access under Exemption (j)(2) are also exempt under the FOIA (J.A. 58-69). After examining the statutory language of the FOIA and the Privacy Act, the court determined that Privacy Act Exemption (j)(2) meets the criteria of FOIA Exemption 3 because it describes with sufficient specificity the types of records agencies have authority to withhold (J.A. 60). The court was not persuaded by petitioners' argument that Privacy Act Exemption (j)(2) could not be considered a FOIA Exemption 3 withholding statute because Congress did not expressly refer to the Privacy Act as an Exemption 3 statute; rather, the court concluded that, so long as a withholding statute meets the requirements of Exemption 3, such an explicit statement is unnecessary (*ibid.*).

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[3] The court of appeals also rejected petitioners' contention that the district court should have required the DEA to prepare a *Vaughn* index in order to justify denial of access pursuant to Exemption (j)(2) (J.A. 57-58). See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). The court observed that such indices were unnecessary because Privacy Act Exemption (j) applies generally to entire systems of records, unlike the FOIA exemptions, which usually apply only to individual documents or parts of documents (J.A. 57). Accordingly, once agency records sought by a first party requester are identified as being contained within an exempt system of records, a *Vaughn* index need not be prepared because no further judicial inquiry is required (J.A. 57-58).

In addition, the court of appeals rejected petitioners' argument that the reference in Privacy Act Exemption (j) to an agency's authority to exempt material from the requirements of "this section" (*i.e.*, the Privacy Act) renders this withholding statute outside the scope of FOIA Exemption 3 (J.A. 60-61). The court noted that if this language were read as permitting disclosure under the FOIA of records that have been exempted from disclosure under the Privacy Act, the result would be contrary to the "clearly stated congressional intent" (J.A. 61), as expressed in the legislative history, to create exemptions in the Privacy Act for criminal justice records that are broader than the comparable exemptions in the FOIA (J.A. 63-66). The court concluded that, while "[petitioners'] interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning" (J.A. 67).

Moreover, the court of appeals found that subsection (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2), did not support petitioners' argument that the Privacy Act access exemptions could be circumvented by the mere filing of a document request under the FOIA (J.A. 61-62, 64-66). The court pointed out that both the introductory language of Section (b) and the history of subsection (b)(2) make clear that the subsection governs only third party requests for records and does not apply to requests by individuals for their own files (J.A. 62, 64-65).[4] The court noted

[4] A request by an individual for another person's records is commonly referred to as a "third party request." A request by an individual for his own records is known as a "first party request." We will use this terminology throughout this brief.

that such first party requests are governed exclusively by Section (d) of the Privacy Act, and that Exemption (j)(2) expressly authorizes an agency to exempt itself from the first party access requirements of Section (d) (J.A. 66).

Finally, the court of appeals refused to adopt petitioners' interpretation of the statutes based on the so-called "third party anomaly" theory, which hypothesizes that if the Privacy Act is an Exemption 3 statute, some third party requesters may obtain greater disclosure of an individual's records than would the individual himself. The court concluded that such an anomaly would rarely, if ever, occur, and it observed that the possible existence of the anomaly today shows little about what Congress intended in 1974, when it enacted the Privacy Act (J.A. 68-69).

SUMMARY OF ARGUMENT

The question presented in this case is identical to that in *United States Department of Justice* v. *Provenzano*, cert. granted, No. 83-1045 (Apr. 2, 1984), which the Court has consolidated with this case for purposes of oral argument. Most of the arguments raised by petitioners were anticipated and answered in our opening brief in *Provenzano*.[5] Accordingly, in responding to petitioners' brief, we will rely to a large extent on the discussion contained in our *Provenzano* brief.

Contrary to petitioners' contention, an analysis of the plain language of FOIA Exemption 3 and Privacy Act Exemption (j)(2) establishes that the latter

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[5] A copy of our brief in *Provenzano* has been sent to counsel for petitioners.

is a withholding statute that meets the criteria of Exemption 3. In order to overcome this plain language, petitioners must provide clear evidence of a congressional intent to exclude the Privacy Act exemptions from the coverage of FOIA Exemption 3. This they have failed to do.

A. Privacy Act Exemption (j)(2) contains a description of the "particular types of matters to be withheld," and thus qualifies as a FOIA Exemption 3 statute. Petitioners erroneously contend that Exemption (j)(2) falls outside the scope of Exemption 3 because it grants unfettered withholding discretion to the agencies. On the contrary, Congress in Exemption (j)(2) has described with particularity the types of matters that law enforcement agencies have discretion to withhold. Exemption (j)(2) thus narrows these agencies' discretion sufficiently to satisfy the concerns that led to the 1976 amendment to Exemption 3, which was intended to exclude statutes that gave agencies carte blanche authority to withhold all documents that came into their possession.

Nor is there any merit to petitioners' claim that Privacy Act Exemption (j)(2) fails to qualify under FOIA Exemption 3 because it does not itself mandate nondisclosure but merely authorizes agencies to promulgate exempting regulations. So long as a withholding statute meets the requirements of Exemption 3, it is immaterial whether the statute simply vests nondisclosure discretion with an agency or empowers the agency to exercise that discretion through promulgation of regulations.

Similarly, there is no basis for petitioners' assertion that, in order to qualify under Exemption 3, a withholding statute must provide for total nondisclosure. A number of statutes that fall within the

scope of Exemption 3 permit materials to be disclosed to certain parties and under certain circumstances.

Contrary to petitioners' contention, the use of the term "this section," rather than "this title," in Privacy Act Exemption (j) does not reflect an intention on the part of Congress to exclude Exemption (j) from the scope of Exemption 3 of the FOIA. Petitioners apparently assume that, in order to come within Exemption 3, a withholding statute must contain an express reference to the FOIA. Exemption 3 imposes no such requirement; it incorporates nondisclosure statutes whether or not they refer to the FOIA. For this reason, petitioners' argument that the Privacy Act did not repeal the FOIA by implication is entirely beside the point.

B. As the legislative history of the Privacy Act access exemptions clearly shows, Congress intended to protect sensitive criminal justice records from disclosure to the subjects of those records. In order to achieve this goal, Congress consciously made the Privacy Act access exemptions broader than the comparable FOIA exemptions covering criminal investigative records. Thus, if petitioners are correct that a first party requester may evade the Privacy Act access exemptions simply by filing a FOIA request, Congress would have engaged in a meaningless gesture in enacting the Privacy Act exemptions and expressly making them applicable to subsection (d)(1) of the Privacy Act, which governs first party requests. The court of appeals' sensible construction of the two statutes avoids this illogical result.

C. Petitioners assert that subsection (b)(2) of the Privacy Act establishes that first party requesters like petitioners may use the FOIA to circumvent the broad law enforcement access exemptions in the Privacy Act. Subsection (b)(2) provides an exception

to the Privacy Act's general rule against disclosure where release of a record is required by the FOIA. As the introductory language of Section (b) and the legislative history of subsection (b)(2) make clear, however, subsection (b)(2) applies only to third party requests. In any event, even if subsection (b)(2) were to apply to first party requests, it would not expand the access rights of first party requesters because FOIA Exemption 3 incorporates the Privacy Act's first party access exemptions. Thus, the FOIA does not require the disclosure to first party requesters of records that have been exempted under the Privacy Act.

D. Petitioners identify several "anomalies" that could conceivably arise if Privacy Act Exemption (j)(2) is an Exemption 3 statute. Because petitioners have produced no evidence that Congress was aware of these anomalies, they shed no light on congressional intent in enacting the Privacy Act. Moreover, petitioners' construction of the Privacy Act and the FOIA would produce the most glaring anomaly, and one that Congress plainly wanted to avoid: requiring disclosure of sensitive law enforcement records to the subjects of those records.

ARGUMENT

PRIVACY ACT EXEMPTION (j)(2) IS A WITHHOLDING STATUTE WITHIN THE SCOPE OF EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT, AND THEREFORE DOCUMENTS EXEMPT FROM ACCESS UNDER EXEMPTION (j)(2) ARE ALSO EXEMPT UNDER THE FOIA

The court of appeals held that because Exemption (j)(2) of the Privacy Act qualifies as a withholding statute under FOIA Exemption 3, petitioners may not invoke the FOIA to seek records that they are

barred from obtaining under Privacy Act Exemption (j)(2). Petitioners have sought to minimize the importance of FOIA Exemption 3 to this case. They have focused primarily on the general pro-disclosure policy of the FOIA, on some of Congress's general purposes in enacting the Privacy Act, and on a reading of a provision of the Privacy Act other than the particular Privacy Act exemption at issue, while addressing the language of FOIA Exemption 3 and Privacy Act Exemption (j)(2) only at the end of their brief (Pet. Br. 37-43).[6] As this Court has stated on numerous occasions, however, in construing a statute the analysis must begin, not end, with the statute's plain language. See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). It seems to us fairly obvious that petitioners have attempted to avoid dealing with the plain language of FOIA Exemption 3 and Privacy Act Exemption (j)(2) because the language of those statutes "is sufficient to resolve the question presented" (*United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6) in a manner adverse to petitioners.

A. Privacy Act Exemption (j)(2) Is A Withholding Statute Within The Literal Language Of FOIA Exemption 3

In our opening brief in *Provenzano* (at 18-20), we showed that Privacy Act Exemption (j)(2) "refers to particular types of matters to be withheld" and thus constitutes a statutory exception to dis-

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[6] The court of appeals decisions on which petitioners primarily rely do not even consider whether Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute. See *Greentree* v. *United States Customs Service*, 674 F.2d 74, 79 (D.C. Cir. 1982); *Porter* v. *United States Department of Justice*, 717 F.2d 787, 797 n.11 (3d Cir. 1983).

closure within the meaning of FOIA Exemption 3, 5 U.S.C. 552(b)(3). Exemption (j)(2) is limited in scope to Privacy Act "records" that are kept within "systems of records" maintained by a criminal law enforcement agency and that deal with specifically described law enforcement activities.[7]

Despite the detailed description in Exemption (j)(2) of the types of matters that agencies may withhold, petitioners contend (Pet. Br. 38-41) that Exemption (j)(2) is not a FOIA Exemption 3 statute because it grants withholding discretion to the agencies. Petitioners apparently believe that, in order to

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[7] Privacy Act Exemption (j)(2), 5 U.S.C. 552a(j)(2), provides in pertinent part:

> The head of any agency may promulgate rules * * * to exempt any system of records within the agency from any part of this section [with specified exceptions] if the system of records is
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> * * * * *
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

qualify under Exemption 3, a withholding statute must either exempt material absolutely or define the criteria to be used in determining whether or not to disclose. This argument reads the "particular types of matters" prong out of Exemption 3.

Contrary to petitioners' argument, the language of FOIA Exemption 3 reveals that the exemption encompasses *three* types of withholding statutes: (1) statutes that bar disclosure absolutely; (2) statutes that do not bar disclosure absolutely but that establish specific criteria to guide an agency's exercise of its discretion not to disclose; *and* (3) statutes that do not bar disclosure absolutely or provide criteria for nondisclosure, but that describe the particular types of matters an agency has discretion to withhold.[8]

Petitioners seek to excise this third category from the statute by arguing (Pet. Br. 41) that Privacy Act Exemption (j)(2) does not qualify under FOIA Exemption 3 because it "grants absolute and unreviewable discretion to agency heads, and establishes no criteria to inform that discretion." However, the language and structure of Exemption 3 make clear that, when Congress has described with particularity the types of matters an agency has discretion to withhold, it has narrowed the agency's discretion

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[8] Exemption 3 states that the FOIA does not apply to matters that are—

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

sufficiently to avoid the problems created by statutes, such as the one involved in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), that simply gave an agency carte blanche authority to withhold all documents that happen to come into its possession. See *De Laurentiis* v. *Haig*, 686 F.2d 192, 197 (3d Cir. 1982); *Founding Church of Scientology, Inc.* v. *NSA*, 610 F.2d 824, 827 (D.C. Cir. 1979).

As discussed in our *Provenzano* brief (at 19-20), the courts of appeals have identified, as within the scope of FOIA Exemption 3, a number of statutes that specify the particular types of matters agencies have discretion to withhold without also setting forth particular nondisclosure criteria.[9] When the language of Privacy Act Exemption (j)(2) is compared to that of these other statutes that have been found to fit within the "particular matters" prong of FOIA Exemption 3, the conclusion is inescapable that Exemption (j)(2) is also an Exemption 3 statute.

2. Petitioners next contend (Pet. Br. 41-42) that Exemption (j)(2) is defective because it does not itself mandate nondisclosure, but merely empowers specified agencies to promulgate regulations exempting records systems from the access provisions of the Privacy Act. Accordingly, petitioners argue that this Privacy Act exemption does not meet the requirements of FOIA Exemption 3, which states that the FOIA "does not apply to matters that are * * * specifically exempted from disclosure *by statute*" (5

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[9] See, *e.g.*, *Goland* v. *CIA*, 607 F.2d 339, 349-350 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980) (50 U.S.C. 403(d)(3)); *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1219-1221 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980) (35 U.S.C. 122); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 742-743 (D.C. Cir. 1983) (8 U.S.C. 1202(f)).

U.S.C. 552(b)(3) (emphasis added)). This contention is unavailing because petitioners have offered no basis to distinguish, for purposes of FOIA Exemption 3, between statutes that simply vest nondisclosure discretion with agencies and statutes that empower agencies to exercise that discretion through promulgation of regulations. In either situation, Congress has by statute given limited nondisclosure discretion to an agency. Indeed, requiring an agency to exercise withholding discretion through published regulations, preceded by notice and an opportunity for public comment and accompanied by a reasoned explanation, is perfectly consistent with Congress's aim of amending FOIA Exemption 3 to restrict the agencies' exercise of withholding discretion. Privacy Act Exemption (j)(2) thus satisfies both the letter and the spirit of FOIA Exemption 3.

Petitioners' position would seem to limit the scope of Exemption 3 to those statutes that themselves mandate which material should not be released. As we have just shown, however, Exemption 3 clearly applies to certain statutes that leave disclosure discretion with an agency. It therefore is immaterial that Privacy Act Exemption (j)(2) does not itself prohibit disclosure of records, but instead authorizes agencies to exempt from disclosure specifically identified material. The fact remains that this statute particularly describes the types of matters that agencies have discretion to withhold. That is sufficient to bring it within the scope of FOIA Exemption 3.

Moreover, as we demonstrated in our brief in *Provenzano* (at 24-30), the legislative history of the Privacy Act exemptions reflects "[a] congressional appreciation of the dangers inherent in airing particular data." *American Jewish Congress* v. *Kreps*,

574 F.2d 624, 628 (D.C. Cir. 1978). In enacting the Privacy Act, Congress took great care to provide a means for agencies to protect sensitive law enforcement records from disclosure to the subjects of those records. Indeed, Congress deliberately made the Privacy Act law enforcement records exemptions broader than the comparable exemptions in the FOIA. See pages 21-23, *infra*.

In short, Congress was aware of the dangers that would flow from disclosure of sensitive law enforcement records, and it was Congress that made the basic policy decision that criminal justice agencies must have authority to bar access to those records when necessary. Thus, Privacy Act Exemption (j)(2) is unlike those statutes that Congress meant to exclude from FOIA Exemption 3 when it amended that exemption following this Court's decision in *FAA Administrator* v. *Robertson*, *supra*.

3. Petitioners seek to engraft on Exemption 3 a requirement that a withholding statute must provide for total nondisclosure. According to petitioners (Pet. Br. 42-43), an Exemption 3 statute cannot permit disclosure under some circumstances but not others. Petitioners do not explain the origin of this additional requirement, for which there is no support in either the language or history of Exemption 3. For our part, we know of no reason why a statute that establishes an access exemption for only certain types of requests cannot qualify as an Exemption 3 statute.

Other Exemption 3 statutes permit materials to be disclosed to certain parties or under certain circumstances. For example, the Tax Reform Act of 1976, 26 U.S.C. 6103, which sets forth a general nondisclosure rule, provides a wide variety of exceptions to that rule, based in part on the identity of the

persons or agencies seeking disclosure. Nevertheless, a number of courts have held that Section 6103 is an Exemption 3 statute. See, *e.g.*, *King* v. *IRS*, 688 F.2d 488, 496 (7th Cir. 1982); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 835-840 (5th Cir.), cert. denied, 444 U.S. 842 (1979). Similarly, Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. 2055(b)(1), which this Court has held to be within Exemption 3 (see *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 122), provides for public disclosure if certain conditions are present (the agency must determine, inter alia, that the information is "accurate" and that disclosure will be "fair in the circumstances"). By the same token, the nondisclosure provision of the Patent Act, 35 U.S.C. 122, is an Exemption 3 statute (see *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1219-1221 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980); *Lee Pharmaceuticals* v. *Kreps*, 577 F.2d 610, 614-617 (9th Cir. 1978)) despite the fact that it permits disclosure when necessary to carry out the provisions of any Act of Congress or when appropriate "special circumstances" exist. Thus, contrary to the premise underlying petitioners' argument, a statute can qualify as a withholding statute under FOIA Exemption 3 even though it proscribes disclosures only for certain classes of requests while allowing others. Accordingly, it is immaterial that Privacy Act Exemption (j)(2) denies access for requests by certain parties but not others.

4. Contrary to petitioners' contention (Pet. Br. 15-16), the use of the term "this section," rather than "this title," in Privacy Act Exemption (j) does not manifest a congressional intention to exclude Exemption (j) from the scope of FOIA Exemption 3. As

we explained in our brief in *Provenzano* (at 20-21), a withholding statute need not include an express reference to the FOIA in order to qualify as an Exemption 3 statute. On the contrary, Exemption 3 incorporates nondisclosure statutes that satisfy its criteria whether or not they expressly refer to the FOIA. Indeed, Exemption 3 clearly was meant to encompass withholding statutes that were enacted before, and therefore that could not have included any reference to, the FOIA. Withholding statutes enacted after the FOIA also have been held to come within Exemption 3, despite the lack of any reference therein to the FOIA. See, *e.g.*, 26 U.S.C. 6103 (Tax Reform Act). Withholding statutes that by their terms meet the requirements of Exemption 3 do not need any further evidence of congressional intent in order to qualify under Exemption 3.[10]

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[10] For this reason, petitioners err in seeking to draw a favorable inference from the fact that the legislative history of the Privacy Act and of the 1976 amendments to FOIA Exemption 3 contain no explicit statement that Congress intended Exemption (j)(2) to be an Exemption 3 statute (Pet. Br. 43). The language of Exemption (j)(2), on its face, demonstrates that that statute is a withholding statute within the meaning of FOIA Exemption 3. As this Court has stated:

> it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) (footnote omitted).

As we discuss below (see page 29, *infra*), Congress included subsection (b)(2) in the Privacy Act because otherwise Section (b) of the Act would qualify as a FOIA Exemption 3 statute. The fact that Congress did not include

The fallacy in petitioners' argument may be shown conclusively by examination of the Government in the Sunshine Act, 5 U.S.C. 552b. The Sunshine Act requires that certain agency meetings be open to the public. 5 U.S.C. 552b(b). It then provides exceptions to that requirement, as well as to the mandate that "information pertaining to such [open] meeting[s]" be made public. 5 U.S.C. 552b(c). However, the Sunshine Act nondisclosure provision states only that the open meeting and disclosure requirements *of that statute* shall not apply in particular circumstances.[11] The Sunshine Act is in this sense identical to the Privacy Act; both statutes contain exemptions that authorize agencies to withhold material that otherwise would be disclosed because of other portions of the same statute. Yet, it is clear that Congress believed that the Sunshine Act would qualify as a FOIA Exemption 3 statute, because Congress took care expressly to exclude the Sunshine Act from the

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a similar provision preserving FOIA disclosure rights with respect to matters covered by the Privacy Act exemptions strongly suggests that it intended those exemptions to constitute withholding statutes under Exemption 3.

[11] 5 U.S.C. 552b(c) provides in pertinent part:

> (c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to [come within one of a number of listed exemptions].

scope of Exemption 3.[12] Thus, the fact that Privacy Act Exemption (j)(2) by its terms exempts agencies only from the access requirements of the Privacy Act does not in any way undermine the status of Exemption (j)(2) as a FOIA Exemption 3 statute.

5. Petitioners argue at length (Pet. Br. 27-33) that there is no evidence that Congress intended the Privacy Act to effect a repeal of the FOIA. In our brief in *Provenzano* (at 34-35), however, we pointed out that because Privacy Act Exemption (j)(2) qualifies as a withholding statute within the meaning of FOIA Exemption 3 (and is thereby incorporated into the FOIA), it is not necessary to find that the Privacy Act repealed the FOIA in order to conclude that records exempt from access under the Privacy Act are also exempt under the FOIA. See H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 14 (1976) (Exemption 3 is intended to "incorporate by reference exemptions contained in [the] * * * statutes" it describes). Petitioners' repeal by implica-

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[12] Indeed, the 1976 amendment to FOIA Exemption 3 was enacted as part of the Sunshine Act. See Pub. L. No. 94-409, § 5(b), 90 Stat. 1247. Exemption 3 of the FOIA, as amended in 1976, provides in pertinent part that the FOIA "does not apply to matters that are * * * specifically exempted from disclosure by statute (*other than section 552b of this title*)" (emphasis added). This qualification would have been unnecessary if petitioners' argument were correct.

As discussed in our *Provenzano* brief (at 22-23), the fact that Exemption 3 of the FOIA does not expressly exclude the Privacy Act exemptions from its coverage—as it does with respect to the exemptions of another related open records statute (the Sunshine Act)—serves to confirm that Congress meant the Privacy Act exemptions to be treated under FOIA Exemption 3 like any other withholding statute. See *Painter* v. *FBI*, 615 F.2d 689, 690-691 (5th Cir. 1980).

tion analysis is entirely irrelevant to the question presented here.

B. Petitioners' Construction Of Exemption (j)(2) Ignores Congress's Deliberate Decision To Fashion Privacy Act Access Exemptions That Are Broader Than Those In The FOIA

Petitioners contend that, in enacting the Privacy Act, Congress established a records access system that was meant to be complementary to, and subject to being overridden by, the disclosure scheme of the FOIA. Petitioners' position is based in part on an examination of the general purposes of the FOIA and the Privacy Act (Pet. Br. 9-11). But the general purposes of these statutes are of little help in determining the specific intent of Congress in creating the Privacy Act access exemptions. Indeed, petitioners overlook the fact that Congress deliberately fashioned the Privacy Act access exemptions so that they would be broader in scope than the comparable FOIA exemptions.

In our brief in *Provenzano* (at 24-27), we showed that Congress created broad access exemptions in the Privacy Act to protect sensitive intelligence and law enforcement files from disclosure to individuals like petitioners who are the subjects of those sensitive records. See H.R. Rep. 93-1416, 93d Cong., 2d Sess. 18 (1974) (*Leg. Hist.* 311); S. Rep. 93-1183, 93d Cong., 2d Sess. 23 (1974) (*Leg. Hist.* 176); 120 Cong. Rec. 36644 (1974) (remarks of Rep. Moorhead) (*Leg. Hist.* 883); 120 Cong. Rec. 36907 (1974) (remarks of Sen. Percy) (*Leg. Hist.* 811); 120 Cong. Rec. 36911 (1974) (remarks of Sen.

Ervin) (*Leg. Hist.* 943).[13] In addition, we pointed (Br. 27-29) to specific evidence of Congress's intent to authorize agencies to prevent first party access to law enforcement records *beyond* the restrictions on disclosure of such records in the FOIA. See H.R. Rep. 93-1416, *supra*, at 19 (*Leg. Hist.* 312); 120 Cong. Rec. 36651 (1974) (remarks of Rep. Ichord) (*Leg. Hist.* 902); 120 Cong Rec. 36656 (1974) (remarks of Rep. Holifield) (*Leg. Hist.* 912). Of particular significance is Congress's rejection of a provision in the Senate bill (S. 3418, 93d Cong., 2d Sess. §203(b) at 29-30 (Nov. 21, 1974); *Leg. Hist.* 362-363) that would have made the Privacy Act's exemption for law enforcement records coextensive with FOIA Exemption 7, and its adoption of the broad law enforcement records exemptions set forth in Sections (j)(2) and (k)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2) and (k)(2).

Thus, contrary to petitioners' assertion (Pet. Br. 13 n.8), there is considerable evidence in the language and history of the Privacy Act to suggest that Congress did indeed intend, with respect to first party requesters, to create a higher barrier to disclosure than that in FOIA Exemption 7. If this Court were to adopt petitioners' position, it would have to conclude that Congress devoted considerable attention to providing Privacy Act access exemptions that are broader than the FOIA exemptions, but nonetheless intended that persons could, simply by resorting to the FOIA, render those Privacy Act exemptions

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[13] "*Leg. Hist.*" refers to Staffs of the Senate and House Comms. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579)* (Comm. Print. 1976).

meaningless insofar as they are broader than the FOIA exemptions.[14]

As the court of appeals concluded (J.A. 66-67), this is an entirely illogical result: "[T]he legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA." To accept petitioners' argument " 'would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947).[15]

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[14] Petitioners argue (Pet. Br. 13 n.8), without citation of supporting authority, that the purpose of Privacy Act Exemption (j) was to prevent first party requesters from having *greater* access to law enforcement investigative records than they already had under the FOIA. This unsupported hypothesis fails to explain why Congress made the Privacy Act's law enforcement records exemptions *broader* than those in the FOIA.

[15] Petitioners argue (Pet. Br. 11-13) that Congress could not have meant the first party access provisions of the Privacy Act to affect the pre-existing disclosure rights of first parties under the FOIA because the right of access provided by the Privacy Act is solely a "means by which subjects of government records can enforce the other rights to which they are entitled under the Privacy Act" (Pet. Br. 11). But there is nothing in the Privacy Act that would prevent an individual from using subsection (d)(1) of the Privacy Act, governing first party access, solely for the purpose of obtaining his own records.

C. Petitioners' Arguments Are Based On A Misreading Of Subsection (b)(2) Of The Privacy Act

The centerpiece of petitioners' contention that the Privacy Act access exemptions have no effect outside that Act is the erroneous reading of Privacy Act subsection (b)(2) adopted by the courts in *Greentree* v. *United States Customs Service*, 674 F.2d 74, 79 (D.C. Cir. 1982), and *Porter* v. *United States Department of Justice*, 717 F.2d 787, 794 (3d Cir. 1983).[16]

1. Petitioners read Privacy Act subsection (b)(2) as preserving the FOIA disclosure rights of both first and third party requesters (Pet. Br. 12-15); accordingly, they argue that the Privacy Act access exemptions have no impact on FOIA disclosure requests. As we explained in our brief in *Provenzano* (at 35-36), however, the introductory language of Section (b) of the Privacy Act states that the nondisclosure rule of that section does not apply when an individual makes a request for his own records.[17] This language makes it quite clear that the entire section is inapplicable to first party requests. It follows, therefore, that none of the enumerated exceptions to Sec-

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[16] The Third Circuit's discussion of the Privacy Act/FOIA issue in *Porter* was incorporated by reference in that court's decision in *Provenzano* v. *United States Department of Justice*, 717 F.2d 799 (3d Cir. 1983), cert. granted, No. 83-1045 (Apr. 2, 1984).

[17] The opening portion of Section (b) states in pertinent part: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, *except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains*, unless disclosure of the record would be [permissible under one of the 12 exceptions]." 5 U.S.C. 552a(b) (emphasis added).

tion (b)'s general nondisclosure rule—including subsection (b)(2)—has any relevance in the case of a first party request such as those made by petitioners.

Petitioners dispute this analysis by arguing (Pet. Br. 12) that the words "any person" in Section (b) demonstrate that the entire section must apply to both first and third party requests. But this reading is contrary to the language and structure of the section, which states at the outset that an agency shall not disclose a record to "any person" *except* pursuant to a written request from the subject of the record. Thus, the rule of nondisclosure to "any person" is modified by the words that immediately follow. Because disclosure to a first party requester is permitted by this introductory language, it makes no sense to conclude that the 12 subsequently enumerated specific exceptions to the nondisclosure rule also apply to first party requests.[18]

Petitioners attempt to avoid the plain language of Section (b) by turning the section upside down. They assert (Pet. Br. 14) that the introductory language of Section (b) applies only when subsection (b)(2) does not. But this interpretation requires one to read the statute from bottom to top, for no apparent reason.[19]

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[18] Further evidence of this point is provided by the fact that the enumerated exceptions other than subsection (b)(2) clearly focus on disclosures to third parties.

[19] Petitioners contend (Pet. Br. 15 n.10) that the critical reference in Section (b) to a written request by the subject of a record was included simply to assure that "written" requests were made because the requester's identity under the Privacy Act is crucial, whereas (according to petitioners) it is not material under the FOIA. Petitioners' focus on the word "written" is misdirected. It is difficult to believe that

2. Petitioners assert (Pet. Br. 21-25) that the legislative history of Privacy Act subsection (b)(2) supports their contention that Congress meant to preserve first party access rights to law enforcement records under the FOIA. As we showed in our *Provenzano* brief (at 37-41), however, petitioners' position is based on a misreading of the legislative history.

The privacy bill that passed the Senate contained a first party access exemption for law enforcement records that was similar to the current version of FOIA Exemption 7. See S. 3418, *supra*, § 203(b) at 29-30 (Nov. 21, 1974); *Leg. Hist.* 362-363. At the same time, the Senate bill contained a provision that would have made the entire bill—including the bill's first party access exemptions—subject to other federal disclosure statutes, including the FOIA. See S. 3418, *supra*, § 205(b) at 32 (Nov. 21, 1974); *Leg. Hist.* 365. Thus, the Senate bill would not have increased a law enforcement agency's ability to protect its records—with respect to both first and third party requests—beyond the protections provided in the FOIA.

The House bill, on the other hand, contained no provision permitting disclosure of personal records;

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the sole purpose of the introductory language of Section (b) was to direct agencies not to honor oral records requests. Rather, we submit that the opening part of Section (b) was meant to exclude first party and consented-to third party requests from the general nondisclosure rule of the section. In any event, petitioners' premise is flawed because most, if not all, agencies require that records requests under the FOIA also be made in writing. See, *e.g.*, 28 C.F.R. 16.3(a) (Department of Justice). Furthermore, at least under FOIA Exemptions 4, 6, and 7(C), the identity of a requester is relevant in determining whether those exemptions can be invoked.

it would have exempted from public disclosure "all individually-identifiable information in Government files" (H.R. Rep. 93-1416, *supra*, at 13; *Leg. Hist.* 306). The first party access exemptions for law enforcement records in the House bill were similar to those in the Privacy Act as ultimately enacted (see H.R. 16373, 93d Cong., 2d Sess. §§ (j) and (k) at 32-34 (Oct. 2, 1974); *Leg. Hist.* 289-291), and thus were considerably broader than those in the Senate bill.

The conferees rejected the provision in the Senate bill that would have made the bill's first party access exemptions subject to the FOIA. Instead, they adopted the House bill's prohibition against public disclosure, but added what is now subsection (b)(2) of the Privacy Act, providing an exception to Section (b)'s nondisclosure rule where *third party* disclosure is required by the FOIA.[20] The conferees retained the broad access exemptions of the House bill, permitting an agency to withhold law enforcement records from *first party* requesters. Thus, the House compromised by permitting disclosure to third parties

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[20] That Privacy Act subsection (b)(2) relates to third party disclosure requests is confirmed by a statement in the Senate Report concerning an earlier version of subsection (b)(2), Section 202(c) of S. 3418, 93d Cong., 2d Sess. 43 (Sept. 26, 1974); *Leg. Hist.* 139. That provision was initially included in the Senate bill in order "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. 93-1183, *supra*, at 71; *Leg. Hist.* 224. Although this provision was deleted from the Senate bill on the floor of the Senate (120 Cong. Rec. 36889 (1974); *Leg. Hist.* 765), a substantially similar provision was inserted into the legislation in conference and became subsection (b)(2) of the Privacy Act.

of records that otherwise would be available under the FOIA, while the Senate compromised by accepting the broad first party access exemptions in the House bill that extend beyond the comparable exemptions in the FOIA.[21] By this compromise, Congress ensured that an individual would not be able to use the FOIA to obtain agency records pertaining to him when those records are exempted from first party access under the Privacy Act.[22]

3. Even if, despite its plain language and history, subsection (b)(2) may be interpreted as governing first party requests, petitioners' argument nevertheless must fail because it does not give effect to FOIA Exemption 3. Subsection (b)(2) states that no

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[21] Contrary to petitioners' contention (Pet. Br. 12, 23, 24-25), this reading of the legislative history is supported by Congress's enactment of Section (q) of the Privacy Act, 5 U.S.C. 552a(q). As the court of appeals pointed out (J.A. 64-65 (footnotes omitted)):

> Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q) without any limiting provisos.

[22] Petitioners' reliance (Pet. Br. 23) on a staff-prepared analysis of the Senate-House compromise (120 Cong. Rec. 40406, 40882 (1974); *Leg. Hist.* 861, 989) is misplaced. As we explained in our brief in *Provenzano* (at 40-41), this analysis addresses a situation in which the consent of the subject of a record has not been obtained. Thus, like Section (b) itself, the analysis refers to disclosures pursuant to *third party* requests and sheds no light on congressional intent regarding *first party* requests, such as those made by petitioners.

agency shall disclose any Privacy Act records unless disclosure would be *required* by the FOIA. In determining whether the FOIA requires disclosure, one must look not only to the FOIA's disclosure provisions, but also to all of the FOIA exemptions, including Exemption 3. As discussed above, Exemption 3 states that the FOIA does not apply to matters that are exempted from disclosure by statute. In this situation, FOIA Exemption 3 incorporates the Privacy Act access exemptions, which exempt specified records from first party disclosure. Consequently, because the FOIA does not require disclosure (as a result of the operation of Exemption 3), Privacy Act subsection (b)(2) provides first party requesters with no greater right to disclosure than they would enjoy in the absence of that provision.[23] This analysis does not in any way render subsection (b)(2) meaningless because, as we stated in our *Provenzano* brief (at 36 n.19), without subsection (b)(2), Section (b) itself would constitute a FOIA Exemption 3 statute with respect to unconsented-to third party requests. Of course, in the case of third party re-

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[23] Contrary to petitioners' argument (Pet. Br. 16), the fact that Privacy Act Exemption (j) provides that an agency may not exempt its systems of records from Section (b) does not undermine this analysis. Exemption (j) provides exemptions from the access and certain other requirements of the Privacy Act. Section (b), however, does not affirmatively require an agency to provide access to its records. Indeed, Section (b) is basically a *nondisclosure* provision, with certain limited exceptions. Congress's inclusion of Section (b) in the list of those parts of the Privacy Act that are excluded from Exemption (j) can best be explained by its desire to make clear that the Privacy Act exemptions were not intended to override the general nondisclosure rule of Section (b) or the limited exceptions permitting, but not requiring, disclosures under specified circumstances.

quests, the Privacy Act's first party access exemptions would not prevent access and Exemption 3 would not be called into play.

In sum, petitioners' heavy reliance on subsection (b)(2) is misplaced, and the court of appeals was correct in concluding that this provision does not require release of criminal justice records when access to those records is barred under the Privacy Act.

D. Reading Exemption (j)(2) As An Exemption 3 Statute Best Accomplishes Congress's Purposes

1. Petitioners argue (Pet. Br. 18-20) that if Exemption (j)(2) is a FOIA Exemption 3 statute, several anomalies would arise. They contend that these anomalies prove that Congress could not have intended the result reached here. However, petitioners overlook the fact that the Privacy Act was passed in considerable haste, with compromises being worked out at the last moment. See *Exner* v. *FBI*, 612 F.2d 1202, 1206 n.9 (9th Cir. 1980); *Cell Associates, Inc.* v. *NIH*, 579 F.2d 1155, 1160 (9th Cir. 1978); 120 Cong. Rec. 40410-40412 (1974) (remarks of Sen. Hruska) (*Leg. Hist.* 871-876). Under these circumstances, it is hardly surprising that some unintended difficulties may arise in harmonizing the Privacy Act and the FOIA.

The anomalies noted by petitioners are minor ones that should occur in only a few special instances. On the other hand, if petitioners' position is adopted, a far more significant anomaly arises: the congressional goal of providing comprehensive protection against disclosure of sensitive criminal justice records to the subjects of those records would be endangered. If petitioners are correct, an individual whose access to his criminal investigation records is

absolutely barred by the Privacy Act may nevertheless seek to obtain those records—and may succeed in obtaining at least some of them—under the FOIA. Unless petitioners can solve this anomaly, their position is untenable.

Petitioners echo the D.C. Circuit in *Greentree* (674 F.2d at 80-81) in asserting that, even if the Privacy Act exemptions can be evaded through the FOIA by first party requesters, these exemptions would still retain some meaning because they allow an agency to exempt itself from certain other requirements of the Privacy Act. In our brief in *Provenzano* (at 32-33), we demonstrated that Congress deliberately structured Exemption (j) so as to include the first party access provision among the Privacy Act requirements that can be avoided through agency promulgation of Exemption (j) regulations. Petitioners' construction of the Privacy Act nullifies Congress's explicit direction that Exemption (j) apply to subsection (d)(1). Moreover, as the legislative history clearly shows, Congress in the Privacy Act intentionally created access exemptions for law enforcement records that are broader than the comparable exemptions in the FOIA. To the extent that the Privacy Act access exemptions go beyond those in the FOIA, they undoubtedly would be rendered meaningless if petitioners' view were to prevail.

2. We have discussed the so-called "third party anomaly" in our *Provenzano* brief (at 41-44), and believe it unnecessary to repeat that discussion here. In addition to the "third party anomaly," petitioners argue (Pet. Br. 19-20) that, if Exemption (j)(2) is a FOIA Exemption 3 statute, foreign nationals and business entities would enjoy greater access rights under the FOIA than would other requesters.

This result would obtain because neither foreign nationals nor business entities have access rights under the Privacy Act; accordingly, the broad Privacy Act access exemptions are not applicable to requests made by them.

Although it is conceivable that foreign nationals may file FOIA requests with federal agencies seeking records relating to themselves, the number of such requests is not likely to be significant. Hence, it is understandable that such an "anomaly" would not have captured Congress's attention when it enacted the Privacy Act. With regard to records requests by business entities, it is also not surprising that an anomaly might conceivably occur because Congress in the Privacy Act was plainly focusing on individuals and government records pertaining to them. In any event, we reiterate that petitioners' position, which ignores Congress's intent to provide comprehensive protection against disclosure of criminal justice records to the subjects of those records (beyond the protections available in the FOIA), creates a much more significant anomaly than those identified by petitioners as arising from our interpretation of the statutes. It would be peculiar indeed if the one problem that Congress plainly intended to solve were ignored out of concern that the solution might create anomalies of decidedly lesser magnitude that Congress did not even anticipate.[24]

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[24] Petitioners point out (Pet. Br. 20) that it may be possible for an individual to circumvent the access system established by Congress in the Privacy Act by recruiting a surrogate to act as a third party requester. As we observed in our brief in *Provenzano* (at 44 n.26), this sham request ploy sheds no light on the intent of Congress in enacting the Privacy Act. Furthermore, assuming that such a request would have to be honored, the mere fact that Congress did not enact a foolproof

3. Petitioners argue (Pet. Br. 25-27) that our position is inconsistent with the 1974 amendment to FOIA Exemption 7, 5 U.S.C. 552(b)(7), which is narrower than Privacy Act Exemption (j)(2). Petitioners' argument on this point ignores the fact that Exemption (j)(2) has no effect at all on third party requests and on requests for materials that do not constitute Privacy Act "records." FOIA Exemption 7 thus covers a vast number of documents to which Exemption (j)(2) has no application. Accordingly, if Privacy Act Exemption (j)(2) is an Exemption 3 statute, FOIA Exemption 7, as amended in 1974, would remain fully applicable with respect to a large number of documents and requests. Given the broader reach of FOIA Exemption 7 with respect to the documents covered, and the fact that Congress —shortly after it narrowed FOIA Exemption 7— deliberately fashioned the Privacy Act law enforcement records access exemptions so that they would provide greater protection against disclosure to the subjects of those records than FOIA Exemption 7, it is not at all "inconceivable" (Pet. Br. 26) that Congress intended Privacy Act Exemption (j)(2) to be given its full effect despite the 1974 amendment to Exemption 7.[25]

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system is not a sufficient basis for depriving the Privacy Act access exemptions of all meaning to the extent that they go beyond the exemptions in the FOIA. The possibility that requesters might attempt to exploit possible loopholes in the statute is hardly a justification for not giving the fullest possible effect to the scheme enacted by Congress.

[25] Congress amended Exemption 7 in response to four decisions of the D.C. Circuit. See *FBI* v. *Abramson*, 456 U.S. 615, 627 n.11 (1982); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-229 (1978). All of those cases involved

Petitioners seek to undermine our position by stating (Pet. Br. 32 n.19) that the government's "principal quarrel" is with FOIA Exemption 7. That is not correct. Our position in this case does not stem from any quarrel with the scope of Exemption 7. We have not sought to expand the reach of Exemption 7 for third party requests or for requests involving material not covered by the Privacy Act. Rather, we simply contend that Congress made clear its intent in the Privacy Act to provide protection against disclosure of sensitive law enforcement records to first party requesters *beyond* the protections available in FOIA Exemption 7, and that the courts below properly gave effect to that intent.[26]

4. It is well settled that statutes are to be reconciled whenever, and to the fullest extent, possible. See *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974). Congress certainly was aware of the FOIA when it passed the Privacy Act. It is difficult to believe that Congress, which enacted a comprehensive scheme governing first party access to criminal investigative records (a scheme containing exemptions broader than those in the FOIA), nevertheless intended the Privacy Act scheme to have no further applicability

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third party requests for agency materials under the FOIA. Thus, it does not appear that Congress was focusing on first party requests when it amended Exemption 7.

[26] Petitioners contend (Pet. Br. 33-36) that their argument is supported by administrative constructions of the FOIA and the Privacy Act. We have addressed this contention in full in our brief in *Provenzano* (at 45-47). We note only that, contrary to petitioners' assertion (Pet. Br. 36 n.24), the current OMB guidelines, which state that Privacy Act Exemption (j) (2) is a FOIA Exemption 3 statute, are supported by a full explanation of OMB's position. See 49 Fed. Reg. 12338-12341 (1984).

once a first party files a request for these records under the FOIA. See *Terkel* v. *Kelley*, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) ("the [FOIA] cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt").[27] Cf. *Chamberlain* v. *Kurtz*, 589 F.2d at 840. The attempt by petitioners to frustrate the congressional intent embodied in the Privacy Act exemptions must accordingly be rejected.

In sum, the courts below correctly ruled that Privacy Act Exemption (j)(2) meets the criteria of FOIA Exemption 3, and that this interpretation accomplishes the congressional purpose of authorizing federal law enforcement agencies to protect their sensitive criminal investigative files from disclosure

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[27] In *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), this Court reached a similar conclusion with respect to the relationship between the Education of the Handicapped Act (EHA) (which provides a detailed and comprehensive remedial scheme for protecting the right of a handicapped child to a free and appropriate public education) on the one hand, and Section 504 of the Rehabilitation Act of 1973 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, on the other. In light of the comprehensive nature of the scheme set out in the EHA, the Court concluded that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme," and that, therefore, "where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim." *Smith* v. *Robinson*, slip op. 19, 20. See also *id.* at 22-28 (reaching the same conclusion where a claim may be available under both the EHA and the general antidiscrimination provision of Section 504).

to the subjects of those files. Accordingly, the judgment below, upholding the DEA's refusal to release petitioners' records to them, should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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